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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	
	)	CC Docket No. 94-129
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	

COMMENTS OF U S WEST, INC. TO NOTICE OF PROPOSED RULE MAKING AND PETITION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

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September 15, 1997

No. of Copies rec'd 0+11
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SUMMARY

U S WEST[1] herein responds to the Commission's inquiry as to how best implement Section 258 of the Act in order to arrest the unauthorized change of a customer's preferred carrier ("PC"). While such changes can, on occasion, be the result of mere human error, all too often they are the result of intentional slamming conduct that amounts to misrepresentation (either the making of a false or misleading statement or the failure to disclose or explain a material fact), fraud, unfair and deceptive trade practices and forgery.

The Commission's prior regulatory attempts to control slamming have not resulted in purging the marketplace of bad actions by some carriers. Indeed, it is because slamming conduct is so persistent in nature that U S WEST shares the Commission's concern that it could easily make its way into the intrastate arena just at the time that competition is attempting to gain a fair foothold there. Indeed, U S WEST is already seeing the insinuation of slamming conduct with respect to our customers and their toll services.

While the Commission seems to believe that Section 258 provides it with a powerful additional weapon to add to its quiver in fashioning sure and quick regulatory responses that -- everyone hopes -- will be effective in curbing slamming, U S WEST is more sanguine in its assessment of that statutory provision. We do not believe that Section 258 will afford any easier regulatory oversight than the current Commission rules. Nor do we believe the cure for slamming lies in general

[1] All acronyms or abbreviations used in this Summary are fully identified in the text.

industry regulation. Rather, the cure for slamming is treating the conduct as what it is: egregiously unreasonable for a common carrier to engage in and often criminal.

Targeted fines and forfeitures set at a much higher level than the Commission has previously established need to be set in place. Fines should be assessed in the $100,000 to $1M level, and repeat offenders should bear monetary penalties aligned with their repeated bad actions.

To the extent that the enforcement burden associated with slamming is too heavy a burden to bear at the higher end of the fine/forfeiture range, U S WEST proposes an alternative fine/forfeiture mechanism. That proposal targets each act of slamming, above a set percentage ratio figure, and assesses a smaller fine for each act with fines to be paid quarterly. Particularly for repeat offenders, the very numbers associated with their slamming acts makes out a *prima facie* case of intentional misconduct, which such offenders should have to rebut. Simultaneously with the assessment of the fine/forfeiture, Executing Carriers should be permitted to put into place more stringent "verification" requirements that the Commission's generally-appropriate and flexible verification rules permit. Finally, the percentage ratio for fine/forfeiture assessment should reduce over the next three years, so that carriers appreciate that "slamming is over" and the competitive marketplace will be rid of this evil within a defined and predictable time frame.

Targeting carriers that slam individuals is the most appropriate regulatory response to slamming. Removing existing carrier flexibility regarding verification

options, prohibiting or heavily regulating otherwise lawful speech (such as confirmation letters, carrier solicitations for services, or PC freeze communications), burdening inbound communications between individuals and carriers, or changing the *status quo* of Executing Carrier liability are all unnecessary and potentially overbearing regulatory responses. Carriers that have worked long and hard to build solid reputations and engage in fair competition should not be victimized by appropriate regulatory wrath associated with slamming.

While significant regulation in the general marketplace is unnecessary if slamming carriers are targeted and prosecuted appropriately, there is a need for a "full and fair disclosure" rule to apply across the board to all carriers regarding all service solicitations and freezes. Such rule should be a predicate to the Commission's verification rules and should be added to the Commission's existing rules. Herein, U S WEST proposes language for such an additional rule.

Whether soliciting an individual *via* phone or direct mail, whether outbound or inbound, whether to confirm a switch or discuss a freeze, carriers should be required to communicate in language calculated to be understood by the individual with whom they are communicating. Unfortunately, this is not currently the case, particularly with respect to intrastate traffic, both toll and exchange.

U S WEST has had its name stolen by callers who claim to be U S WEST or associated with U S WEST when they are not. We have had multitudes of customers who have had their toll service switched -- and they claim without their knowledge. Right now, the language used to solicit customers regarding intrastate

toll is either left unexplained or explained in language that individuals do not appreciate.

This needs to change -- quickly. To the extent the situation continues unabated, the Commission should assume that confirmation letters and PC freeze communications are the logical next step, regardless of their potential to thwart easy-to-do-business-with commercial transactions.

In addition to the above issues, U S WEST addresses the matter of carrier-to-subscriber and carrier-to-carrier liability. The Commission should impose no liability, above that currently reflected in applicable tariffs, on Executing Carriers in the absence of gross negligence or intentional misconduct (something that would rarely be expected to occur). Executing Carriers are not a party to a commercial transaction and receive no revenue from the transaction. There is nothing to indicate that Congress anticipated imposing liability on such carriers and the Commission should refrain from doing so.

With respect to carrier-to-carrier liability (the subject of Section 258), the Commission should attempt to equalize, as much as possible, the situations of paying subscribers and non-paying subscribers. In no event should an individual be relieved of total responsibility for payment to any carrier.

Either the subscriber should be required to pay some carrier (either the Slamming Carrier or the Original Carrier) for the amount the Slamming Carrier would have charged, with the surplusage associated with the call (i.e., that above what the subscriber would have paid the Original Carrier) being utilized by the Original Carrier for administrative expenses associated with the return, including

payment of bonuses, premiums, etc.; or the paying subscriber should receive a reimbursement back from the Original Carrier for those sums paid above what the subscriber would have paid, and the non-paying subscriber should be liable to the Original Carrier for the same amount. Should the latter approach be chosen, the Original Carrier would have a separate claim over against the Slamming Carrier for the administrative expenses.

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COMMENTS OF U S WEST, INC. TO NOTICE OF PROPOSED RULE MAKING AND PETITION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

I. INTRODUCTION

U S WEST, Inc. ("U S WEST") shares the Federal Communications Commission's ("FCC" or "Commission") concern about unauthorized carrier changes and supports the elimination of the practice before it insinuates itself insidiously into the intrastate jurisdictions. We fully support the Commission's observation that "[w]ith the anticipated increase in local competition, the consumer protection and competitive goals and policies underlying the [Commission's earlier orders involving carrier changes] will be equally important in both local and long distance markets."[1]

[1] In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Further Notice of Proposed Rule Making ("NPRM") and Memorandum Opinion and Order on Reconsideration ("MO&O"), FCC 97-248, rel. July 15, 1997 ¶ 43.

Indeed, as discussed more fully below, there are carrier practices appearing in the marketplace even now that generate great cause for concern with respect to customer carrier selections in the intrastate jurisdiction. Unless curbed early and forcefully, it is predictable that customers will increasingly be taken advantage of with respect to their carrier(s) of choice.

The Commission has demonstrated significant consumer protection motivations in its various carrier-change proceedings, ranging from the selection of a carrier in an initial presubscription context to the process of carrier verifications to the language and form of the Letter of Agency/Authorization ("LOA"). Yet, "slamming"[2] remains a persistent problem and the source of almost a third of the

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[2] As the Commission notes, the Telecommunications Act of 1996 ("1996 Act" or "Act") does not define slamming, but the Joint Explanatory Statement at 1 does reference slamming as an illegal change to a subscriber's carrier selection. NPRM at n.14. This statement contains the suggestion that it is carrier conduct (not customer authorization) that is at issue and that the conduct involves some evil intent or generally recognized criminal conduct. Compare NPRM ¶ 4 (equating slamming to "illegal means"), ¶ 6 (referencing "unscrupulous carriers" and "deceptive practices"), ¶ 9 (suggesting that the Commission's proposed rules will protect against "deceptive and misleading marketing practices"), ¶ 11 (slamming rewards companies that "engage in deceptive and misleading practices"); MO&O ¶ 44.

Contrast the above with the Commission's prior definition of slamming which is "the unauthorized conversion of a consumer's interexchange carrier (IXC) by another IXC, an interexchange resale carrier, or a subcontractor telemarketer," found in In the Matter of Cherry Communications, Inc., Order, 9 FCC Rcd. 2086, 2087 ¶ 4(e) (1994). With respect to this latter definition, it is important to note that the Commission focuses not on the conduct of the carrier but on the authorization of the customer.

Furthermore, neither the Commission's previous definition of slamming nor the limited legislative history associated with the term has ever referenced an Executing Carrier as being a party capable of slamming, something that will be discussed more below in Section VIII.C. with respect to Executing Carrier liability.

complaints received by the Commission in 1995.[3] Obviously, the Commission's current regulation is, and has proven to be, insufficient to control slamming by some carriers.[4]

The failure of the Commission's regulations to control slamming is not so much the result of the wording of the regulations (although, as we discuss in more detail below, that wording must be improved) as it is the result of conduct of the entities engaged in slamming and the reluctance of regulatory authorities, for whatever reason, to "call a spade a spade." When a customer's carrier of choice is changed without his/her authorization[5] and is changed in either a grossly negligent or intentional manner, the action violates not only the Commission's regulations but the laws of the various states and federal government, as well, under the nomenclatures of unfair and deceptive trade practices, misrepresentation, fraud, and forgery. Carriers engaging in such conduct should feel the full effect of

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[3] According to the Commission's Common Carrier Scorecard, (providing consumers and the industry with relevant information about telecommunications services) Fall, 1996 ("Scorecard") at 14, more than one-third (34.4 percent) of the written complaints submitted to the Commission's Consumer Protection Branch in 1995 related to slamming. Operator service provider complaints accounted for 17.6 percent, and information service provider complaints (including 900 providers) accounted for 11 percent. *All other complaints combined accounted for 37 percent.*

[4] In the Matter of MCI Telecommunications Corporation, Notice of Apparent Liability for Forfeiture, 11 FCC Rcd. 1821, 1823 ¶ 10 ("MCI Forfeiture") ("The pervasiveness of the problem suggests that our current administration of the law has not produced sufficient deterrence to non-compliance").

[5] In this filing, U S WEST makes a conscious attempt to use the term "unauthorized change" to describe those changes that might occur without proper authorization, but which do not involve any malevolent or deceptive intention by a carrier, i.e., those changes caused by inadvertence, human error, or even simple negligence. The term "slamming" is used to describe at least grossly negligent conduct (i.e., failure to supervise) and, most often, intentional conduct.

governmental enforcement, including maximum statutory fines and penalties and perhaps even jail sentences,[6] despite the burdens and resource problems associated with such enforcement.

In is not correct to claim that the Commission's existing carrier-change regulatory regime contains insufficient "incentive[s] to curtail practices that lead to consumer complaints."[7] For most carriers, it clearly does. Similarly, it is not correct to claim that technology and economics[8] provide "[c]arriers [with] an economic incentive to slam."[9] For most carriers, there is no incentive to slam, regardless of economics and technology.[10]

Some bad-acting carriers -- not "most" carriers -- slam customers.[11] It is these carriers that leave customers feeling that their accounts were "'pirated' or 'hi-jacked'

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[6] As stated recently by Rick Hays, U S WEST Communications Vice President-Montana, at Senate field hearings conducted by Montana Senator Conrad Burns, chairman of the Communications Subcommittee of the Senate Commerce, Science and Transportation Committee, "Stronger penalties and enforcement are the keys to protecting consumers from slamming."

[7] MCI Forfeiture, 11 FCC Rcd. at 1281 ¶ 10.

[8] NPRM ¶ 4 (where the Commission observes that "[s]lamming has become prevalent because of developments in technology and telecommunications economics"). See also MO&O ¶ 50 (making the observation that ANI technology "may provide increased incentive and opportunity for IXCs to 'submit or execute' unauthorized changes." (footnote omitted)), ¶ 51.

[9] NPRM ¶ 4.

[10] The "incentive" observation suffers from a cause/effect logical disconnect. Slamming is no more caused by economics and technology than forgeries are caused by pens or computer technology.

[11] Compare MO&O ¶ 53 (where the Commission observes that "some IXCs" have used LOAs combined with checks to mislead and deceive consumers, but "most" use the checks "in an appropriate and non-misleading manner." Thus, the Commission declined to change its regulatory policy regarding checks. The same "some/most"

. . . and that they are 'abused, cheated, and irreversibly exploited.'"[12] It is no wonder individuals make such claims, since they often have been caught up in a web of deception, fraud and criminal conduct. The bad-acting carriers that engage in such conduct should face a regulatory enforcement regime directed at them.

Pursuing an enforcement agenda, rather than one that blankets the industry with regulation, is the correct approach. As Sol Trujillo, President of U S WEST Communications, Inc., stated in announcing a U S WEST regulatory proposal to deal more aggressively with slamming carriers (discussed below), "[U S WEST's] proposal would force companies guilty of repeated slamming to change their ways or go out of business -- without penalizing the large majority of companies who act responsibly."

It is inappropriate for an entire telecommunications industry to be burdened by onerous regulations to curb conduct that has been described by the Commission itself as "willful[ ],"[13] "particularly egregious,"[14] and involving "falsified or forged" documents.[15] While generally applicable industry regulations can continue to be fine tuned to make clear a carrier's obligation for honesty and fair dealing, and the language of the Commission's telemarketing and LOA rules should be modified to

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observation can be made about slamming behavior across the board: "most" carriers do not engage in slamming; "some" carriers do.

[12] NPRM ¶ 8. See also "Statement of Commissioner Susan Ness on Slamming," Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, Aug. 12, 1997, Billings, Montana at 1.

[13] In the Matter of AT&T Corp., Order, 11 FCC Rcd. 17312 ¶ 2 (1996).

[14] MCI Forfeiture, 11 FCC Rcd. at 1822 ¶ 8.

[15] Id. at 1823 ¶ 10.

make more clear exactly what services are going to be affected by a carrier change, enforcement is the key to reducing slamming. And more stringent enforcement is what must be undertaken, especially with respect to repeat and persistent offenders.

The Commission's current fine and forfeiture regulations seem ill-equipped to deal with slamming carriers. The fines are not high enough for egregious offenses and not low enough to allow for a more creative "per-incident" assessment (that can incrementally get very large as the incidents become voluminous). Below, in Section II, U S WEST describes our proposal for regulatory action regarding slamming. We suggest a change in the Commission's fine/forfeiture structure that would provide a better vehicle for demonstrating regulatory wrath regarding slamming than that currently in place. U S WEST's model is based on factual reporting, where demonstrated and persistent high levels of alleged slamming are matched with relatively small but consistent fines assessed quarterly. These "fines per incident" produce potentially larger fines/forfeitures than the Commission assesses currently.

Fines, in conjunction with a regulatory requirement that no carrier change will be (or need be) made on behalf of offending carriers in certain categories absent additional verification obligations until such time as the complaint level is reduced, are appropriate regulatory actions, targeted to offending carriers. This approach is superior to one involving general obligations imposed on all carriers, despite their reputation for honesty and integrity or sound market conduct.

U S WEST's enforcement plan operates in a more targeted way than the Commission's proposal, which focuses primarily on the newly enacted Congressional remedy for slamming, Section 258(b). Section 258(b) will undoubtedly prove insufficient, in the long run, to curb slamming because a carrier that intentionally slams a customer is likely to intentionally stall forking over funds to another carrier and intentionally drag its feet with respect to private dispute resolution.[16] Complaints for funds due and owing filed with the Commission are the next predictable result. Such complaints will tax the Commission's resources as much as self-initiated Commission enforcement actions would be expected to do.

Contrasted with the potential administrative burdens associated with relying solely on Section 258(b), U S WEST's plan focuses on those carriers that generate inordinate numbers of slamming complaints, persistently over time. Our plan is crafted to hit carriers that engage persistently in slamming where it hurts -- in the pocketbook. The only way slamming will be eliminated from the marketplace is to make it very expensive for abusive carriers to engage in the conduct.

In addition to addressing the best-designed regulatory remedy to rid the marketplace of slamming, U S WEST addresses other matters raised by the NPRM. In Section III, we address the matter of confirmation letters being sent to customers about whether they meant to switch carriers, which communications might also include an invitation to return to the communicating carrier and may include the

[16] In this regard, U S WEST submits that the jury is still out on whether, by enacting Section 258, Congress "has substantially bolstered" the Commission's "continuing efforts to deter, punish, and, ultimately, eliminate slamming." NPRM ¶ 9. And see Ness Statement at 3.

offer of an incentive to accept the invitation. U S WEST disagrees with the Commission's suggestion that such a communication might be inappropriate. Clearly, the First Amendment protects such communication, provided the information communicated is lawful and not deceptive and the communication is generated by information that is not exclusively the proprietary information of another carrier.

In Section IV, we address the problem with current terminology regarding telephone toll service and an impending marketplace dysfunction associated with individuals being slammed with respect to intrastate toll, not necessarily because they did not consent to certain actions but because they were not aware that they had consented to them. The problem has to do with "bullet point" choices referencing terms like "local toll" service that have no common marketplace definition.

Here we argue that the Commission should amplify its existing service-change and LOA form/content rules by establishing a general carrier obligation regarding "full and fair disclosure" that would apply to any communication between a carrier and a customer regarding service origination, service changes, or service freezes. We believe such a rule is appropriate across all categories of carrier activities regarding the provision of services and that it is particularly advantageous because of its ease of application in an in-bound calling environment, where an individual has made a predetermination to order service and "telemarketing" (as that term is generally understood) does not really occur.

In Section V, we address verification options. Here we discuss both the "welcome packet" option contained in the Commission's current telemarketing verification rules,[17] as well as the Commission's suggestion that incumbent local exchange carriers ("ILEC") might properly be relegated to using only a single verification option, i.e., third-party verification. U S WEST supports maximum flexibility being accorded carriers regarding verification options. Thus, we do not support the Commission's proposal to eliminate the "welcome package" option nor the suggestion that ILECs be confined to using a single verification option.

In Section VI, we comment on the Commission's recent conclusion that its existing telemarketing rules should apply to a potential business relationship when a customer initiates a call to a carrier with a pre-determination to establish service or simply to learn more about the carrier or its offerings.[18] The Commission's analysis in this area focuses almost entirely on those individuals calling a carrier to inquire about a matter, with little discussion of those individuals calling a carrier with a pre-determined intent to purchase or subscribe to service. The failure to accord appropriate consideration to this latter category of callers will result in an application of the Commission's telemarketing rules that is ill-suited to the totality of communications undertaken in an in-bound-calling environment.

For these reasons, U S WEST asks, in this filing, for reconsideration on this issue, as it was recently resolved in the Commission's Memorandum Opinion and

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[17] 47 C.F.R. § 64.1100(d).

[18] MO&O ¶¶ 44-51; NPRM ¶¶ 19-20.

Order on Reconsideration. Rather than the simple application of the existing rules to in-bound calling, U S WEST requests that the Commission confine the application of its telemarketing rules only to calls that originate as "inquiry" calls. In the alternative, we urge the Commission to rely on the "general disclosure rule" proposed by U S WEST with respect to all carrier conduct as a rule better suited to the totality of the types of communication that are engaged in with respect to in-bound calling rather than the application of any of the Commission's existing rules.

With respect to the Commission's NPRM request for additional information on the impact of applying the existing telemarketing rules to in-bound calling,[19] U S WEST provides evidence of administrative and operational burdens on U S WEST's business resulting from the application of the verification rules as they currently exist.

In Section VII, we address the matter of PC freezes[20] and language around the terms "intrastate" and "intraLATA" or "local" toll. As U S WEST has stated previously, PC freezes operate basically as a self-help consumer band-aid *vis-a-vis*

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[19] NPRM ¶¶ 19-20.

[20] The Commission describes such a freeze, "also called a block," as one that "prevents a carrier change unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent." NPRM at n.4.

Throughout this document, U S WEST uses the "PC" (Preferred Carrier) abbreviation rather than PIC (Primary Interexchange Carrier) because of the application of the rules to the future environment where they will apply to carrier switches across jurisdictions and services. Where appropriate, in context, U S WEST may use the term PIC, referring solely to interexchange service providers.

carrier slamming conduct,[21] some of which results from confusing or misleading communications (intentional or unintentional) between carriers and customers.

Increasingly, because IXC solicitations (as well as LOAs and freeze documents submitted by them) have failed to make clear to customers all the facts around a switch or a freeze (as either might affect the customer's service from their existing carrier), customers are being slammed away from their existing intrastate, intraLATA toll carriers. This problem is so significant that carriers, such as U S WEST, which previously have not advised customers affirmatively about slamming protections, must begin to think about PC freeze communications simply to protect against customer theft.

In our discussion, U S WEST proposes that the combination of our proposed "umbrella disclosure rule," as well as a change to the existing LOA rule, might alleviate some of the perceived need for carriers to solicit PC freezes. If the initial carrier communications are clear, and full and fair disclosure is made, then there should be fewer down-stream allegations that certain switches were "unauthorized" and less need for consumer protection mechanisms such as freezes.

Beyond the clear and obvious need for the Commission to prescribe language around the "types" of services affected by carrier switches (including language of LOAs and PC freeze communications), U S WEST believes that the content of those communications -- if accurate and not deceptive -- is protected by the First

[21] U S WEST Reply, File No. CCB/CPD 97-19, RM 9085, filed June 19, 1997 at 1.

Amendment. We also ask that the Commission clarify that no carrier is required to send a PC freeze communication.

In Section VIII, U S WEST addresses various liability issues, including a subscriber's liability to a Slamming Carrier and to an Original Carrier. We demonstrate that, while the matter becomes complicated by whether or not the subscriber has paid the Slamming Carrier in the first instance, the goal of equalizing the situation as between a paying subscriber and a non-paying subscriber requires one of two approaches: 1) that a paying subscriber receive something in the nature of a refund from the Original Carrier for the payment of charges that exceed what the Original Carrier would have charged for the network traffic;[22] or 2) that the non-paying subscriber be required to pay the Original Carrier either what the Slamming Carrier would have charged (with the Original Carrier keeping whatever surplusage exists over and above its own rates to cover the administrative costs of the reinstatement) or what the Original Carrier would have charged the subscriber (with the Original Carrier then having a claim against the Slamming Carrier for expenses, premiums, etc.).

What would be unacceptable would be for a subscriber to be absolved of any payment obligation to any carrier. Nothing in the legislative history suggests such Congressional intent, and the proposal would frustrate the fundamental expectation of the remedy provided in Section 258(b) -- that the Slamming Carrier pay the

[22] If this were the resolution, a claim by the Original Carrier against the Slamming Carrier would exist for the expenses associated with reinstatement, including bonuses, premiums, etc.

Original Carrier and cover that Carrier's foregone revenues. At least for the time being, the Commission should stick to the legislatively endorsed remedy and enact a subscriber payment obligation that replicates that remedy, to the extent payment to the Slamming Carrier has not actually occurred. Obviously, additional remedies can -- and might -- be adopted if the remedy outlined in the Act proves insufficient.

Also, in Section VIII, U S WEST addresses the matter of carrier liability for incorrect PC submissions, with respect to either the Submitting or Executing Carrier. U S WEST finds the Commission's tentative conclusions to be a promising first step but in need of refinement. The Commission, in its tentative proposal, has essentially rendered carriers strictly liable for accidents, errors, and omissions.[23] There is nothing to suggest that Congress intended that strict liability be the standard, which it could have done easily had it so intended.

Any carrier could well be the cause of a change of carrier, either through an incorrect submission or execution, through mere accident or inadvertence. The regulations the Commission is required to prescribe under Section 258(a) should accommodate this type of mistake, such that non-culpable actions do not constitute "violations" of the Commission's verification rules, i.e., such actions do not equal "slamming." Only bad acts associated with some type of sceinter (a minimum of

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[23] While the Commission does not expressly acknowledge this as the standard of liability, its language suggests it intends that liability would attach for mere mistakes, as well as errors or omissions short of even simple negligence. NPRM ¶ 35 ("liability may attach to the executing carrier under Section 258 where the executing carrier changes the PC selection of the wrong subscriber [no submitting carrier], converts the subscriber to the wrong carrier [submitting carrier is incorrectly identified] or fails to perform the PC change in a timely manner").

negligence and more in the case of an Executing Carrier) should amount to "violations" of the Commission's regulations for liability purposes under Section 258(b).

In particular, Executing Carriers (which generally have no intent to deceive, especially when processing third-party submissions) should not be saddled with any liability because those carriers collect no revenues for the telecommunications services rendered and were clearly not contemplated by Congress as being a part of the "remedy" associated with slamming conduct (the parties to the remedy being confined to the Slamming Carrier and the Original Carrier).

While there will be, to be sure, Executing Carrier errors in the absence of gross negligence (the current tariff standard for most carriers), Executing Carriers should be relieved of liability. The affected carriers (which, as discussed below, might not even include a Submitting Carrier) should resolve the charging arrangements pursuant to the Commission's prior carrier compensation rule, which should be reinserted in the Commission's rules.[24]

[24] The Commission's current iteration of its rules as appended to the NPRM/MO&O includes the Section 258(b) remedy established by Congress and does not contain any reference to the Commission's prior carrier compensation rule as outlined in its 1995 Report and Order. In the Matter of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Report and Order, 10 FCC Rcd. 9560, 9579 ¶ 37 (1995) ("1995 Report and Order"). (The Commission's prior rules had not codified the remedy either.) U S WEST believes that the Commission should amend its proposed rules to include both remedies.

II. ENFORCEMENT, NOT BROAD INDUSTRY REGULATION, IS THE KEY

A. Commission's Current Information And Enforcement Activity

The Commission has in its possession facts that confirm that some carriers repeatedly and persistently engage in slamming conduct. The Commission's Scorecard is replete with information about slamming and with facts associated with specific carriers. For example, the Commission knows that "[i]n absolute numbers, the largest companies generally received the most complaints. [But] [a]fter adjusting for company size, the ratio of complaints filed against the largest companies was far below some of their smaller competitors."[25]

The graphs included within the Scorecard identify specific carriers by name, with their slamming complaint ratios.[26] Ratios that are in the double-digits (0.10 and above) include Frontier-ld, NetServ, NatAccts, Nationwide, ComTel, Heartline, EqualNet and Furst.[27] Ratios in the single digits (specifically 0.04 and below) include MCI, AT&T, and Sprint.

Yet, despite one of the Commission's conclusions from the information, that "[t]he complaint patterns suggest that smaller companies may be using sales and marketing practices that raise consumer concerns about slamming,"[28] the list of

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[25] Scorecard at 1, inset.

[26] The Commission defines the slamming complaint ratio as "the number of slamming complaints served divided by total communications-related revenue for the companies that received slamming complaints and that had more than 100 total complaints." Scorecard at 11.

[27] Sonic is also identified with the largest ratio, but it has since ceased doing business. Id.

[28] Id., Figure 1.

companies included in the Commission's "Slamming Enforcement Actions"[29] includes at least two of the large carriers and only one of the carriers identified on the graph as being in the double-digit ratio category. (Since the publication of the Scorecard, one additional carrier in the double-digit ratio category has been prosecuted.)

Furthermore, the enforcement actions of the Commission have been targeted primarily to forgery allegations -- only the most egregious of slamming activities. And, despite the seriousness of the allegations -- basically allegations of criminal conduct -- the fines/forfeitures proposed have been below the maximum for common carrier violations, hovering around $40,000 per violation.[30]

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[29] Id. at 3.

[30] Over the past few years, the Commission has demonstrated a pattern of fining companies around $40,000 per single forged LOA. See, e.g., In the Matter of Excel Telecommunications, Inc.; Apparent Liability for Forfeiture, File No. ENF-95-15; NAL/Acct. No. 516EF0005, Notice of Forfeiture, 11 FCC Rcd. 19765 (1996) (total fine of $80,000 for two incidents); In the Matter of Long Distance Services, Inc. Apparent Liability for Forfeiture, File No. ENF-97-04; NAL/Acct. No. 716EF0003, Order of Forfeiture, DA 97-956, rel. May 8, 1997 (total fine of $80,000 for two incidents). Yet full fines result generally only where there is a failure to enter into a Consent Decree (which results in a voluntary payment to the Treasury less than the proposed fine). See, e.g., In the Matter of LCI International Worldwide Telecommunications, File No. ENF-95-19; NAL/Acct. No. 516EF0008, Order, DA 97-1814, rel. Aug. 26, 1997 (original notice of apparent liability ("NAL") fine of $40,000 for single incident reduced to $15,000 in consent decree included in Order); In the Matter of Matrix Telecom, Inc., File No. ENF-96-02; NAL/Acct. No. 616EF002, Consent Decree, 11 FCC Rcd. 21541 (1996) (original NAL fine of $40,000 for single incident reduced to $30,000); In the Matter of MCI Telecommunications Corporation, File No. ENF-96-01; NAL/Acct. No. 616EF0001; Order, 11 FCC Rcd. 12630 (1996), and Consent Decree, 11 FCC Rcd. 12632 (1996) (original NAL fine of $40,000 per incident reduced to $15,000 - total fine of $30,000); In the Matter of Nationwide Long Distance, Inc., File No. ENF-96-03; NAL/Acct. No. 616EF003, Order, 12 FCC Rcd. 1175 (1997), and Consent Decree, 12 FCC Rcd. 1177 (1997) (original NAL fine of $40,000 per incident reduced to $15,000 - total fine of

Just recently, in its Fine/Forfeiture Guidelines Order,[31] the Commission announced that "the base forfeiture amount for misrepresentation at the statutory maximum for the particular type of service provided by the violator" was appropriate as a guideline because "[r]egardless of the factual circumstances of each case, misrepresentation to the Commission always is an egregious violation."[32] Why is misrepresentation to an individual consumer any less an egregious violation than misrepresentation to the Commission? Why -- instead of $40,000 or $75,000 per alleged unauthorized conversion of a customer's carrier[33] -- should a carrier that intentionally engages in slamming conduct not be assessed the maximum statutory penalty applicable to common carriers of $100,000 for each violation up to a maximum of $1M for each continuing violation?[34] Why shouldn't an offending

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$30,000); In the Matter of Home Owners Long Distance, Inc., File No. ENF-96-05; NAL/Acct. No. 616EF005, Order and Consent Decree, DA 97-604, rel. Mar. 25, 1997 (original NAL fine of $40,000 per incident reduced to $15,000 - total fine of $30,000); and In the Matter of AT&T Corp., File No. ENF-96-06; NAL/Acct. No. 616EF006, Order, 11 FCC Rcd. 17312 (1996) (original NAL fine of $40,000 for single incident reduced to $30,000).

[31] In the Matter of The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, CI Docket No. 95-6, Report and Order, rel. July 28, 1997 ("Fine/Forfeiture Guidelines Order").

[32] Id. ¶ 21.

[33] To conform the Commission's proposed fine/forfeiture guidelines to its existing practice, the Commission recently reduced the proposed fine for slamming from $75,000 to $40,000 per incident. MCI had requested the change, on the grounds that some slamming could "easily result from human error" (id. ¶¶ 37-38) and urged the creation of an additional category of violation dealing with failure to verify orders. The Commission agreed that the forfeiture guidelines amount should be reduced to bring the guidelines in line with current Commission assessments, without commenting on the substance of MCI's arguments.

[34] 47 U.S.C. § 503(b)(2)(B). These amounts have been increased by rule to $110,000 and $1.1M. 47 CFR 1.80(b)(5).

carrier be prosecuted by the Department of Justice for fraud, with its principals perhaps jailed?

In U S WEST's opinion, intentional slamming conduct (which forgeries clearly are) warrants fines far in excess of $40,000. We believe that assessment of fines/forfeitures more in line with the maximum statutory amounts permitted under the law would clearly provide greater bang for the Commission's enforcement buck and should be pursued aggressively.

To the extent that the pursuit of violators under substantial fine/forfeiture NALs is too labor intensive or resource consuming for the Commission to easily handle or absorb as a matter of day-to-day routine, then a better, swifter remedy to deal with slamming carriers must be devised. U S WEST proposes just such a model below.

B. Per-Incident Guidelines/Assessments

Rather than focusing on large or maximum fines per incident, U S WEST believes the Commission would be better served by working primarily with the numbers -- particularly in those cases where the ratio of complaints to a carrier's operations makes out a *prima facie* case of unlawful conduct through slamming behavior. While the Commission observes that "[t]he complaint patterns [of which it is aware] suggest that smaller companies may be using sales and marketing practices that raise consumer concerns about slamming,"[35] what the information shows is that smaller companies are engaging persistently in slamming conduct --

[35] Scorecard at 11, Figure 1.